United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

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In the Matter of
George H. King, Individual Doing Business as George H. King Rubber Company, and Also as George H. King Tire Company,
Bankrupt.

Wm. H. Moore, Jr., Trustee in Bankruptcy,
Appellant,

vs.

D. B. Barnes,
Appellee.

Wm. H. Moore, Jr., Trustee in Bankruptcy,
Appellant,

vs.

Empire Tire & Rubber Company, a Corporation,
Appellee.

OPENING BRIEF OF APPELLANT.

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OPENING BRIEF OF APPELLANT.

Relying almost wholly upon the case of Miller Rubber Company v. Citizens Trust & Savings Bank, 233 Fed. 488, the appellant urges that the orders, judgments and decrees in these two cases must be reversed.

Two Appeals.

This is an appeal by the trustee in bankruptcy of George H. King, from a judgment in favor of D. B. Barnes, a petitioner in reclamation for certain personal property [Tr. pp. 116, 2]; also the appeal by the trustee from a judgment in favor of Empire Tire & Rubber Company, a petitioner in reclamation for certain personal property [Tr. pp. 129, 156].

History of Case at Bar.

We will discuss the Barnes case first: In the year 1914, Mr. D. B. Barnes purchased a vulcanizing plant on South Main street, Los Angeles, and placed the said George H. King in charge thereof. In 1914 or 1915 Mr. Barnes and Mr. King entered into an agreement whereby Mr. Barnes furnished money and purchased a stock of tires and placed it in the store of Mr. King with the provisio that when the profits from the business should have repaid Mr. Barnes the amount of money he advanced that Mr. King should then become a half owner in the business. [Tr. p. 53].

Partnership Agreement.

This agreement between Mr. Barnes and Mr. King was indisputably a partnership agreement, a notice of dissolution having been made by the parties November 27, 1916. [Tr. p. 55.]

It is significant, in this connection, that Mr. Barnes testified as follows:

"Under the terms of the dissolution King was not to repay me anything." [Tr. p. 54.]

Mr. Barnes also testified that on September 11, 1916, there was due to him from the George H. King Rubber Company $5,682.45. [Tr. p. 74.] It will be noted, *throughout the record of the case*, that the partnership name under which Mr. Barnes and Mr. King did business was "George H. King Rubber Company." [Tr. p. 35.]

Contract of Parties.

Accordingly Mr. Barnes and Mr. King entered into a written contract dated November 27th, 1916 [Tr. pp. 56, 57], *the construction of which is asked as almost entirely covering the issues in the Barnes case.*

This contract is as follows [Tr. pp. 56, 57]:

"Agreement made in duplicate and entered into this 27th day of November, 1916, by and between D. B. Barnes, first party, and George H. King, second party, witnesseth:

"That first party has delivered to second party at his automobile tire store at #1331 South Main street in the city of Los Angeles, California, a number of automobile tires, each suitably tagged and separately numbered, of different sizes, different makes and values, the number, value and size of which will fully appear on Exhibits A, B, C, D, E, F, and G, which are hereto attached and form a part of this agreement.

"*Second party* agrees to use his best efforts and skill to sell said tires at his place of business and to

account and pay to said party of the first part, when so requested, the *price and amount of each tire so sold* as indicated and specified on said exhibits so hereto attached, and second party is to have any sum or amount in excess of the sum specified in said exhibits for each tire so sold as his commission for selling said tires.

"Second party is to keep said tires separate and apart from other tires which he may have for sale and to keep a separate and distinct sales book showing the sales of all tires belonging to said first party which shall be open to the inspection of first party at all reasonable hours.

"First party is permitted to enter the store building of second party where said tires are located at all reasonable hours to inspect and inventory the same.

"Second party is constantly to keep a night watchman in his said place of business without any charge to first party, and first party is relieved from any guarantee of said tires except as to title, and said tires are not to be removed to any other or different location for sale without the written consent of first party.

"It is distinctly understood that the title to said tires is to, and does remain in said first party until the same are sold and nothing herein shall be construed as a sale by first party to second party of said tires, no time being specified as to how long said second party shall have an opportunity of selling said tires, but it is agreed that it shall be a reasonable length of time, depending upon the success which second party shall have in selling the same.

"Parties hereto agree to the above and foregoing conditions and agreements and bind themselves faithfully to carry out the agreements and conditions herein contained.

In the Presence of
E. A. SOMERS.

D. B. BARNES,
GEORGE H. KING."

Attached to this contract were exhibits shown in the record, pages 58 to 67 inclusive. These exhibits are simply *abstract descriptions of the tires claimed by Mr. Barnes.*

Bankruptcy of George H. King.

An involuntary petition in bankruptcy having been filed against the said George H. King and a receiver having been appointed, Mr. Barnes filed his petition to reclaim the goods [Tr. pp. 2 *et seq.*]. Beginning in the record, pages 4 to 8 inclusive, is another statement of the exhibits shown on pages 58 to 67 inclusive, as being the tires claimed from the receiver in bankruptcy. who was afterwards elected trustee in bankruptcy.

Issue of Barnes Case.

The petition in reclamation is in a short form, alleging that Mr. Barnes was the owner of these tires, and prayed for an order that the receiver be required to surrender them.

Upon an order to show cause Wm. H. Moore, Jr., receiver, and afterwards trustee, filed his answer [Tr. pp. 11 *et seq.*] denying all of the allegations of the petition as a first defense. In his second defense he alleges the sale of the goods to said George H. King;

that they were placed in the stock of trade of the said George H. King where he conducted a retail store; that there were no cards in said place of business indicating any ownership in any person of said tires to be reclaimed and were sold in the usual course of business by said George H. King; that the claimant did not fix, nor reserve the right to fix, prices at which the goods were sold, nor to require said George H. King to account for the proceeds of said sale; that the said George H. King was permitted to and did mingle the said goods with his other stock.

When the case came on for hearing before the referee the trustee in bankruptcy offered an amendment to his answer, constituting a third defense [Tr. pp. 26 *et seq.*] to which Mr. Barnes filed objections [Tr. pp. 16 *et seq.*]. The amendment of the trustee pleads facts showing that the partnership, to-wit, George H. King Rubber Company, and composed of Mr. D. B. Barnes, the petitioner, in reclamation, and the said George H. King, was indebted to one creditor, to-wit, the Marathon Tire & Rubber Company in the sum of $1031.47, and prayed that the petition of Mr. Barnes be dismissed and that the trustee have a setoff against said petition unless or until petitioner D. B. Barnes pay said sum of $1031.47. *The purpose of this amendment was to squarely raise the question of law that the partnership could not be dissolved and one partner take about all of the assets without first discharging the debts of the partnership, especially since the exhibits attached to the peition in reclamation showed a number of tires*

purchased from the Marathon Tire & Rubber Company [Tr. pp. 7 *et seq.*] *and that said sum of $1031.47 owing to the Marathon Tire & Rubber Company by the partnership was for some of the very goods which Mr. Barnes claimed from the partnership, as his own, at the time of the dissolution.*

Not All Debts Paid.

The evidence showed that at the time of the dissolution of said partnership on November 26, 1916, George H. King Rubber Company owed to the Marathon Tire & Rubber Company $988.25. [Tr. p. 111.] Mr. Barnes testified that *not all debts were paid at the time of the dissolution of the partnership.* [Tr. p. 76.]

Facts and Conduct of Business.

In arguing the questions of law hereinafter, we shall (analytically in Arabic) follow the rulings of this Honorable Court in the Miller Rubber Company case, *supra*, and General Electric Company v. Brower, 221 Fed., page 597.

These rulings may be properly summarized as follows:

1. Was George H. King the agent of Mr. D. B. Barnes?

The findings of the referee are that Mr. King was the agent for Mr. Barnes. [Tr. p. 39.]

2. Was there a provision in the contract that the *proceeds* of the sales of goods by Mr. George H. King

should be held for the benefit of Mr. Barnes, the petitioner

(a) *There are no findings showing that the proceeds of sales of tires were to be kept for Mr. Barnes by Mr. King.* [Tr. pp. 33 *et seq.*] *The findings do show Mr. King usually paid Mr. Barnes by check, but sometimes by cash, for the total number of tires sold.* [Tr. p. 39.]

(b) Mr. Barnes testified that Mr. King paid him by check for the tires sold each month. [Tr. p. 79.]

(c) The contract itself provides that Mr. King was to pay Mr. Barnes "the price and amount of each tire so sold." [Tr. p. 56.]

(d) Mr. Flinn, an employee of Mr. King, testified that Mr. King paid Mr. Barnes by check. [Tr. p. 100.]

3. Was there any provision for the *return* of the *unsold* goods?

(a) *There is no provisoin in the contract for the return of any goods whatever.*

(b) There are no findings showing that Mr. King was to return any of the goods to Mr. Barnes. [Tr. pp. 33 *et seq.*]

4. Was there any provision for Mr. King to *sell at prices and on terms fixed by Mr. Barnes?*

(a) There is no provision in the contract for the price at which Mr. King should sell tires. [Tr. pp. 56, 57.]

(b) Mr. Barnes testified that Mr. King was to pay to him the price that he, Mr. Barnes, put on the tag. [Tr. p. 74, 75.]

(c) Mr. Barnes further testified: *"I did not fix any price for Mr. King to sell the tires, only the price that he was to account to me for the tires."* [Tr. p. 78.]

(d) The findings show that Mr. King was to *pay* to Mr. Barnes the price stipulated on the tag, only, as fixed by Mr. Barnes [Tr. p. 39]; *but there is no finding showing any ultimate price fixed by Mr. Barnes, or by the parties, at which Mr. King should sell tires.*

5. Was there any provision that all tires should remain the property of Mr. Barnes?

The contract provides: "The title to said tires is to, and does remain in" Mr. Barnes "until the same are sold." [Tr. p. 57.]

Both in the General Electric case, *supra,* and the Miller Rubber Company case, *supra*, the contracts provided for retention of title in the claimant.

6. Was there any provision requiring Mr. King to pay to Mr. Barnes for the tires sold?

(a) The contract provides that Mr. King was to *pay* "the price and amount of each tire so sold as indicated and specified on the exhibit." [Tr. pp. 56, 79, 100.]

(b) The findings show that Mr. King did pay to Mr. Barnes by check or cash the prices fixed on the tag. [Tr. p. 39.]

7. Was there anything to show, in making sales, that Mr. King was the agent of Mr. Barnes, or did he sell in his own name?

(a) The findings show that Mr. King conducted the business under the name of George H. King Rubber Company. [Tr. p. 35.]

(b) The findings further show: *"Of this agency, however, no notice appears to have been given to the public, nor to the customers or creditors of King. In other words King was not held out by Barnes to the customers or creditors or to the public or to any person whomsoever as the agent, and the public, customers and creditors, with the exception of the Marathon Tire & Rubber Company, had no notice of such agency nor of the nature of the terms of the consignment or bailment."* [Tr. p. 39.]

(c) The dissolution shows that the business was done under the name of George H. King Rubber Company. [Tr. p. 55.]

(d) Mr. Barnes testified: "My impression is I have seen his billing ads, George H. King Rubber Company, also letterheads. I don't know about his billheads. That is all that I know about the character of his business." [Tr. p. 79.]

(e) Mr. Wallace testified: "Mr. Barnes appeared nowhere there as the owner of the tires." [Tr. p. 102.]

8. Was Mr. King permitted to mingle the goods with his other stock?

(a) The findings show that the tires were kept separate and apart from other tires. [Tr. p. 38.]

(b) The contract provided that the tires were to be kept separate and apart from other tires. [Tr. p. 56.]

(c) Mr. Flinn, the employee, testified: *"All we had was just a large aisle between the other tires which Mr. King handled and the Barnes tires, so that would keep them separate.* Q. So you could get around them? A. *Yes, not to keep them separate.* There was a blank space, a walking space around the tires. It was just like putting in this space the tires in a row that belonged to you and leaving a large aisle between there, then piling up the others that belonged to somebody else. In other words, they were distinctly separate." [Tr. p. 101.]

(d) Mr. Barnes, the petitioner, testified: "I don't know whether there were any tires that I do not claim that were mixed in with mine. * * * There was *no fence* or *screen* necessary in the storeroom which was set apart for the tires which I claim. It is all in one store. *There is an aisle-way between the tires* as you go in there." [Tr. p. 80.]

(c) Mr. Flinn further testified: "Before the attachment we knew each size regardless of the maker's name and it was so kept in a separate place." [Tr. p. 103.] These tires were ricked up, one tire on the other, according to their size. [Top p. 104.] * * * They were *separated* entirely from other tires *by an alley way—an aisle.* [Tr. p. 104.] That was the condition at the time they met me out there. There were two rows of his tires of different sizes piled on the west wall and one on the north wall. The different sizes were left and piled right next to them, *just so that we could get through; so as to get a tire out.* Not more

than 12 or 13 inches of space between the piles of Mr. Barnes. Then we had an alley-way of perhaps nearly three feet in front of that; *then other tires were piled up there.* Some of those tires were the same make as claimed by Mr. Barnes, and they were piled the 37x4's by themselves, and so on according to their size. And there were several piles of those along there in that space or alley of three feet. By an alley of three feet I mean that there was a three-foot alley way after piling Mr. Barnes' tires." [Tr. pp. 104, 105].

The referee referred to this evidence as correctly stating the facts, as follows:

Referee: "Mr. Flinn testified, as I understand it, that they kept the tires according to *size,* and *not* according to make. I think Mr. Barnes does not contradict that." [Tr. p. 80.]

Tires Arbitrarily Marked.

These tires were arbitrarily numbered [Tr. pp. 4 *et seq.*, pp 58 *et seq.*] and were largely Marathon tires [Tr. pp. 64 *et seq.*] on hand as partnership property at the time of the dissolution, and is claimed by the trustee herein as part of the assets to be administered by him. There was nothing to indicate ownership of the tires claimed by Mr. Barnes.

Mr. Flinn in this connection testified:

"Just numbers, no name, except the size, and also the numbers of the tire were put on the tires. That is all that was on the card except the word 'consigned,' about an inch and a half long. Mr. Barnes' name was not put on there at all; nothing to show that anybody claimed ownership of the tire." [Tr. p. 98.]

No Insurance on Goods.

Mr. Barnes, the petitioner, testified:

"There was not any insurance taken out on this list of tires which I am claiming. I took out none on mine and no provision was made for any insurance." [Tr. p. 78.]

No Signs Indicating Ownership.

Upon this point Mr. Barnes testified:

"There were not any signs about to designate or indicate ownership or anything of that kind so far as I know." [Tr. p. 79.]

Mr. Flinn testified:

"There were no signs up in the place anywhere indicating to whom any of those tires belonged in that room. There was a sign up on the awning 'George H. King Tire Company,' and that was the only sign about the place in regard to the name of the firm. There were signs up inside, Fisk tires, and Marathon, and advertising cards all about the room. *Mr. Barnes appeared nowhere there as the owner of tires.* [Tr. pp. 101, 102.]

Monthly Cards the Only Report.

On page 75 of the transcript is one of the cards showing the monthly report to Mr. Barnes of the tires sold by the King Rubber Company and the prices which Mr. Barnes was to receive therefor [Tr. p. 76]. These cards were the only reports which Mr. King ever made to Mr. Barnes [Tr. pp. 78, 79]. Mr. Barnes testified:

"Q. So far as you know he made the sales as testified by Mr. Flinn, for cash, deposited the money and gave you his check. Is that correct?

"A. I don't know what he did. I can't tell you from this card how he paid me, but I think he paid me with a check. I think he generally paid me with a check. I have been paid in money. I did not go down to check off to see what he had sold; I went down after he made reports and checked up what tires were remaining there after receiving my cards and a check. Of my own knowledge I don't know anything about the sales." [Tr. p. 79.]

Business Conducted in Same Manner After Dissolution.

There was no change in the business after the dissolution of the partnership.

Mr. Flinn testified:

"So far as selling tires is concerned, business went on as usual after the dissolution of the partnership." [Tr. p. 101.]

He further testified:

"There was nothing changed with regard to the tires after the dissolution of the partnership. [Tr. p. 103.]

Referee's Conclusion.

Upon these facts the referee found that Mr. Barnes was entitled to all of the tires described in the exhibits attached to his petition [Tr. pp. 4-8, inclusive], and made an order accordingly [Tr. pp. 33-46 incl.].

Referee Affirmed by District Court.

The order of the referee directing the trustee to sustain the petition in reclamation, and to return the property to said petitioner, was duly affirmed by the District Court [Tr. p. 51].

LAW, ASSIGNMENTS OF ERROR, BRIEF OF THE ARGUMENT.

We will bring to the court's attention the assignments of error [Tr. p. 122 *et seq.*] in their order.

I.

That the District Court and the Referee Erred in Their Findings, Decisions and Judgment That the Goods, Wares and Merchandise Described in the Petition of Said D. B. Barnes (Save and Except as to the Office Furniture) Was and Is the Property of Said D. B. Barnes; and That Said D. B. Barnes Is Entitled to the Immediate Possession of Said Property.

The whole contention of the trustee herein might properly be presented under the above assignment of error. We desire to present the rulings of this Honorable Court in the General Electric case, and the Miller Rubber case (in Arabic notation), the same as we have reviewed the case at car.

In General Electric Company v. Brower, 221 Fed. 597, the *basic facts are as follows:*

1. The A. Company was the *agent* of the manufacturer.

2. The *proceeds* of all sales belonged to the manufacturer.

3. The agent was to *return* all unsold lamps to the manufacturer.

4. The agent was to sell at *prices* and on *terms* fixed by the manufacturer.

5. All lamps were to *remain* the *property* of the manufacturer until sold.

6. The agent was to *pay* the manufacturer an amount equal to the value of the lamps less his compensation.

7. The agent was *to state on bills and invoices* that he was the *agent* of the manufacturer.

Upon these facts, this honorable court *held* that upon the bankruptcy of the agent the lamps in its possession did not pass to its trustee in bankruptcy and that the General Electric Company *was entitled to recover said property.*

In the case of Miller Rubber Company v. Citizens Trust & Savings Bank, following these same Arabic notations, ~~#243~~ 293 Fed. 488, the basic facts were as follows:

1. W. D. Newerf, the bankrupt, was the exclusive *agent* of the Miller Rubber Company.

2. The contract did *not* require the bankrupt to account to the Miller Rubber Company for the *proceeds* of sales.

3. That Mr. Newerf was to surrender and *turn over* to the Miller Rubber Company *all property belonging to said company.*

4. The contract did *not* fix, nor reserve the *right* to fix *prices* at which goods were to be sold by the bankrupt.

5. That all goods were to remain the *property of the Miller Rubber Company until sold* to *bona fide* customers in the usual course of business.

6. The bankrupt was to report the goods on hand each month to the Miller Rubber Company and *pay* for those sold.

7. *No agency was shown* in the sales of goods, the bankrupt doing business as the W. D. Newerf Rubber Company.

8. The bankrupt was permitted to *mingle* the goods with his other stock.

Upon these facts this Honorable Court held that the *petitioner was not entitled to recover.*

FACTS IN CASE AT BAR.

1. George H. King, the bankrupt, was the *agent* of Mr. D. B. Barnes. [Tr. p. 39.]

2. There are *no findings* showing that the *proceeds* of the sale of tires were to be kept separate and apart by Mr. King for Mr. Barnes [Tr. p. 33 *et seq.*]. The *findings do show* that Mr. King usually *paid Mr. Barnes by check,* but sometimes by *cash,* for the total number of tires sold. [Tr. p. 39.] Mr. Barnes so testified. [Tr. p. 79.] The contract itself provides that Mr. King was to *pay* Mr. Barnes *"the price and amount of each tire so sold."* [Tr. p. 56.] Mr. Flinn also so testified. [Tr. p. 100.]

3. There is *no provision* in the contract whatever *for the return* of any goods by Mr. King to Mr. Barnes. The findings do not show that Mr. King was to *return* any goods to Mr. Barnes. [Tr. pp. 33 *et seq.*]

4. There was *no provision* for Mr. King to *sell at prices and on terms fixed by Mr. Barnes.* [Tr. pp. 56. 57.] Mr. Barnes testified:

"I did not fix any price for Mr. King to sell the tires, only the price that he was to account to me for the tires." [Tr. p. 78. See also Tr. pp. 74. 75.]

The findings show that Mr. King was to pay Mr. Barnes the price stipulated on the tag only [Tr. p. 39]; *but there is no finding showing any ultimate price fixed by Mr. Barnes, or by the parties, at which Mr. King should sell tires.*

5. The contract provides that all tires should *remain* the *property* of Mr. Barnes [Tr. p. 57].

6. The contract required Mr. King to *pay* "the price and amount of each tire so sold as indicated and specified on the exhibits" [Tr. pp. 56, 79, 100. See also p. 39.]

7. There was *nothing* to show in making the sales that Mr. King was the *agent* of Mr. Barnes. *Mr. King did business as the George H. King Rubber Company* [Tr. p. 35].

The findings show that Mr. King was the agent of Mr. Barnes, but further show:

"Of this agency, however, no notice appears to have been given to the public, nor to the customers or credit-

tors of King. In other words, King was not held out by Barnes to the customers or creditors or to the public or to any person whomsoever as the agent, and the public, customers and creditors, with the exception of the Marathon Tire & Rubber Company, had no notice of such agency nor of the nature of the terms of the consignment or bailment" [Tr. p. 39].

8. There is *no finding* and no *rule* stated in the General Electric case covering point No. 8, to-wit, the right or permission to mingle the goods with the bankrupt's other stock. The contract [Tr. p. 56] and findings [Tr. p. 38] in the case at bar are that Mr. King was not permitted to mingle the goods claimed by Mr. Barnes with his own stock and that they be kept separate. On this particular point we have another assignment of error, but it is most certainly true that *in contemplation of law these tires were not kept separate and apart from any other stock of the bankrupt.*

The Three Cases Compared.

Let us now compare the rulings of the Honorable Court in General Electric Company, *supra,* and Miller Rubber Company, *supra,* and the rule that should be applied in the case at bar.

In the General Electric Company case all of the facts were shown affirmatively to be in favor of the claimant and the rule in that case was laid down accordingly that the claimant was entitled to recover. In the Miller Rubber Company case, *supra,* in which this court held the claimant was *not* entitled to recover, the court

found and resolved most of the facts against the claimant's contention: Finding that the contract did *not* require the bankrupt to account for the proceeds (Arabic point No. 2), in *not* fixing the prices (Arabic point No. 4), in requiring the bankrupt to PAY for the goods sold (Arabic point No. 6), and finally in permitting the bankrupt to *mingle* the goods with his own (Arabic point No. 8).

The salient facts of the case at bar are identically the same as the facts in the case of the Miller Rubber Company, with the exception that the Miller Rubber Company case was a *stronger case for the claimant* in that it *did require the return* of the unsold goods (Arabic point No. 3); whereas, in the case at bar there is *no provision for the return of the unsold goods.* The other exception is Arabic point No. 8, to-wit, the contract in the case at bar provides that the tires were to be kept separate and apart, whereas in the Miller Rubber Company case it was found that the bankrupt was permitted to mingle the goods with his other stock. However, all of the facts in the case at bar show that the bankrupt was permitted to mingle the goods with his other stock. [Tr. pp. 80, 101, 103, 104, 105.]

The statements of witnesses, to-wit, Mr. Barnes, the claimant himself, and Mr. Flinn, the employee of the bankrupt, that the tires were kept separate, must be taken into consideration with the other facts to which they testify: That the only thing that separated the tires claimed by Mr. Barnes herein from other tires was an alley way or aisle *"just so that we could get through;*

so as to get a tire out"; that this alley way or aisle was about three feet in width.

It is conclusive, therefore, we urge, that in contemplation of law, the tires claimed herein were not separated from the other stock of the bankrupt at all.

It will be seen, therefore, that the case at bar is not nearly so strong for petitioner Barnes as the Miller Rubber Company case, especially because there was an express provision in the Miller case for the return of the unsold goods; and the authorities cited in the case seem to point to that requirement of the contract as of very conclusive force.

The point observed in the syllabus of the Miller Rubber Company case that the company was to furnish the agent advertising matter and printed with his business name is no different from the case at bar; because, in the case at bar, until dissolution Mr. King at all times did business under the name of George H. King Rubber Company [Tr. pp. 35, 39, 55, 79]. So that as to creditors generally, both in the Miller Rubber Company case and in the case at bar the agent was doing business in his own name.

In Taylor v. Fram, 252 Fed. 465, the last syllabus is:

> "Though by written agreement of the parties goods were consigned to the bankrupt for sale, yet, where the parties treated the transaction as one of actual sale, and the bankrupt was not required to account for the proceeds as provided in the contract, held, that the consignors were liable for goods which they retook on the eve of bank-

ruptcy, for the written agreement could not be invoked as against the trustee in bankruptcy."

On page 469, the court uses this significant language:

"If the bankrupt had given the defendants a mortgage upon the stock in his store, and had been permitted to sell the stock covered by it and to deposit the moneys received in his general account, and use them to meet his liabilities as if no mortgage existed, instead of paying them over to the mortgagee, we should be obliged to hold that the mortgage was fraudulent as against the trustee in bankruptcy. Southard v. Benner, 72 N. Y. 424, 429; Hangen v. Hachemeister, 114 N. Y. 566, 570, 571, 21 N. E. 1046. 5 L. R. A. 137, 11 Am. St. Rep. 691. If that be so as to a mortgage of record, and of which creditors have constructive notice, it should follow a *fortiori* that an agreement of which creditors have no constructive notice, which reserves title to the consignor, *who nevertheless and contrary to its terms permits the consignee to make sales, and deposit the proceeds of sales in his general bank account, and use them for his own purposes, is equally fraudulent as against the trustee.* (Italics ours.)

"The nature of the transaction in which these parties engaged is not to be determined from the written agreement which they made, for they did not keep it. It is more important to know what they *did* than it is to know what they *agreed* they would do, for the purpose of the writing may well have been to conceal from creditors the real nature of the transaction."

This language is significant, because it is true in the case at bar that Mr. King sold goods in the name of

George H. King Rubber Company, in the usual course of business, must have deposited the money in his own name, and paid Mr. Barnes largely by check, sometimes in cash. [Tr. p. 79.]

Conclusion.

Is is our contention, therefore, that upon the authority of the Miller Rubber Company case, being a much more stronger case for the claimant than the present case, the judgment in the case at bar should be reversed.

II.

That the District Court and Said Referee Erred in Finding That the Goods, Wares and Merchandise, Automobile Tires and Accessories Described in the Petition of Said D. B. Barnes Were Upon Consignment to Said George H. King, Doing Business as George H. King Rubber Company or George H. King Tire Company, Reserving Title to Each and All of Said Goods in the Said D. B. Barnes.

Under the ruling invoked by this Honorable Court in the Miller Rubber Company case, the defense of the trustee herein should have been sustained; that said goods were *not* upon consignment; but *were, in legal contemplation, sold to the bankrupt.* This ruling is reversible error.

III.

That Said District Court and Said Referee Erred in Not Finding That the Goods, Wares and Merchandise and Said Automobile Tires and Accessories So Placed in the Possession of Said George H. King, as Aforesaid, by Said D. B. Barnes, Were Sold to Said Bankrupt. That Is: That Under the Facts and the Law, the Manner of Doing Business Between the Said D. B. Barnes and the Said George H. King Constituted a Sale of Said Goods, Wares and Merchandise to the Bankrupt.

This assignment of error is self-explanatory, as under the ruling in the Miller Rubber Company case. it should be *held* that the goods were, in contemplation of law, sold to the bankrupt; that the manner of doing business between Mr. Barnes and Mr. George H. King did, as to the creditors of the bankrupt, *constitute a sale of said goods to the bankrupt.*

IV.

That Said District Court and Said Referee Erred in Ordering That Said Goods, Wares and Merchandise, Automobile Tires and Accessories Be Delivered to Said D. B. Barnes.

Both the referee and the District Court, we urge, erred in their findings, rulings, orders, decrees and judgments directing that the goods be delivered to Mr. Barnes and that his petition in reclamation be sustained. This, we urge, was reversible error.

V.

The Said District Court and Said Referee Erred in Finding the Said Contract Entered Into Between the Bankrupt and Said D. B. Barnes Was Not Fraudulent as to the Creditors of Said Bankrupt.

In General Electric Company, *supra,* on page 602, the court say:

> "To constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor. Or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale."

This Honorable Court, in the Miller Rubber Company case uses this quotation, 233 Fed. at page 491:

> " 'To constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor, *or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale.*' "

In the Miller Rubber Company case there was *neither allegation nor proof* of any fraud; and we do not recall that the question of fraud was raised in the case in any

form. However, this court did hold that *as a matter of law* the contract between the Miller Rubber Company and Mr. Newerf *"operated as a fraud on the creditors of the bankrupt* (page 491). That is: That was the conclusion reached by this court in construing the contract in that case; and in denying the claimant's petition to take the goods which it claimed under the written contract of 1914.

The referee in the case at bar [Tr. p. 41 *et seq.*] goes to considerable length in discussing the question of fraud and holds that there was no fraud. "Had fraud existed, it should be pleaded and proven" [Tr. p. 42]. It seems to us that the ruling of the referee upon the subject of fraud was fruitless,—keeping in mind the ruling in the Miller case upon that subject.

Fraud in Law.

It seems indisputable from the rule laid down in the Miller case that the contract of the parties herein; the conduct of the parties; and all of the facts and circumstances set forth by us under eight separate points (in Arabic notations) following the Miller case, *constituted a fraud in law upon the creditors of the bankrupt.*

We urge that the referee and the District Court erred as a matter of law; and that their rulings and judgments constituted reversible error.

VI.

The District Court and Said Referee Erred in Not Finding That the said D. B. Barnes Should Pay to the Trustee the Sum of $1,031.47, Moneys, Due and Owing by the Co-partnership of George H. King and D. B. Barnes, Doing Business as George H. King Rubber Company, Before the Said D. B. Barnes Could Make Any Claim to Recover Said Goods, Wares and Merchandise, Automobile Tires and Accessories Described in His Petition for Reclamation Herein.

This point raises this question of law; that a partnership cannot be dissolved and one partner take about all of the assets without first discharging the debts of the partnership, especially since the exhibits attached to the petition in reclamation show Marathon tires [Tr. p. 7], which, according to the testimony of Mr. Sarchet were not paid for, because on November 26, 1916, the bankrupt was indebted to the Marathon Tire & Rubber Company in the sum of $988.25 [Tr. p. 111].

Mr. Barnes, the claimant, testified that *not all debts were paid at the time of the dissolution of the partnership.* [Tr. p. 76.]

"The stock belonged to me and I took that stock" [Tr. p. 54].

Again on page 69 he testified:

"Well, in fact, that took all of the good tires in that place of business, all of the good tires. There were

certain hard tires there that we put off by themselves, so that these tires were by themselves, piled up together; all excepting certain tires which were in a sort of barrel or package, Exhibit G, the last page."

The rule upon the subject is well illustrated in a late case by the Texas Civil Court of Appeals:

Sherk v. First National Bank, 206 S. W. 507.

First syllabus:

> "A partner has no specific interest in any particular chattel or part of the firm property, but only in the proper proportion of the surplus of the whole after payment of debts, including amounts due the other partners."

Second syllabus:

> "The assignee or mortgagee of the interest of one partner takes subject to all partnership debts and liabilities, since he can obtain no greater right than the assignor or mortgagor had."

Trustee Vested With Rights of Execution Creditor.

The filing of the petition by Mr. Barnes [Tr. pp. 2, 3,] indisputably shows that the property claimed by him was and now is (or the proceeds of the sale thereof) in the possession of the trustee in bankruptcy.

Section 47 of the Bankruptcy Act, subdivision 2, is in part as follows:

> "And such trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court, *shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.*"

Remington on Bankruptcy, Vol. 2, pages 943, 944, construes this section of the Bankruptcy Act by saying in part:

> "It is doubtless true that the trustee's title since the amendment of 1910 is the most extensive and complete of any in jurisprudence. It also must be borne in mind that the amendment of 1910, by placing the trustee in the position of an execution creditor with a levy on the property in his custody and with an unsatisfied execution on the property not in his custody, gives him more than the rights, which any creditor might have chanced already to have asserted. It gives him *in addition thereto all right* which would have been obtainable by creditors under state law had the trustee been an officer *holding an execution* or equitable process *in behalf of all creditors.*"

In Holmes v. Baker & Hamilton, 160 Fed. 922, this Honorable Court *held* the rule is well settled that "where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims." (Citing a number of cases.)

In closing the opinion the court say:

> "Notwithstanding the dissolution of the co-partnership, it remained, as it was before, the appellant's duty to see that the property of the co-partnership was devoted to the payment of the partnership debts as to which he had not been released."

It is therefore difficult for us to comprehend the ruling of the referee [Tr. p. 44] that "The remedy, if any, lies with the Marathon Tire & Rubber Company as against Mr. Barnes or as against the former partnership of Mr. Barnes and Mr. King." The goods claimed are partnership property. *There was no consideration for the transfer.* Mr. Barnes simply retired from the partnership, filed a notice of the dissolution [Tr. p. 55] and then made the contract [Tr. p. 56], whereby these goods, now claimed by him from the trustee in bankruptcy, were deemed to be held thereafter by the bankrupt as the property of Mr. Barnes.

The contract was signed at the time of the dissolution [Tr. p. 56]. Mr. Barnes and the bankrupt went through the partnership stock, made memoranda, had it typewritten [Tr. p. 68], which is Exhibit A [Tr. p. 58] showing the partnership stock Mr. Barnes is now claiming from the trustee in bankruptcy [Tr. p. 68]. There was, therefore, no consideration whatever passing from Mr. Barnes to Mr. King, or to the partnership, for the partnership property, which he is claiming in the suit at bar.

He is deliberately claiming part of the partnership property as an alleged repayment to him of money supposed to be due from the partner, Mr. King, or the partnership, for money furnished to the partnership long previous by Mr. Barnes with which to purchase goods generally for the partnership.

As a further factor showing that there is no consideration for the reclamation by Mr. Barnes herein, he testified:

"Under the terms of the dissolution King was not to repay me anything" [Tr. p. 54].

We urge that so long as any *debts* of the partnership remained *unpaid* that one partner could not retire and simply take about all of the partnership property *as the partner's share in the partnership.* It is conclusive that there were debts, or there would have been no bankruptcy proceeding. So that the claimant, Mr. Barnes, is virtually foreclosed from claiming that there were no debts. Hence he should not be permitted to take any portion of the partnership property until these debts are paid. Upon this point the rulings of the referee and the District Court are reversible error.

VII.

The Said District Court and Said Referee Erred in Finding That Each and All of the Goods Claimed Herein by the Said D. B. Barnes Were Kept Separate and Apart From Other Goods, Either Belonging to the Bankrupt or Otherwise; There Being No Evidence That Said Goods Were Kept Separate and Apart From the Stock of Goods of the Bankrupt.

We have covered the facts with reference to the goods being kept separate, insisting that in contemplation of law there was no separation of the goods claimed, from other goods of the bankrupt, in any way,

manner or form. The testimony is clear and indisputable that the tires were all in one room; that this included the tires claimed which constituted about all of the good stock of the bankrupt at that time, and that all tires were ricked up according to size; that there was an alley way of three feet between the tires claimed by Mr. Barnes and other tires (which were thrown out) and that this aisle way was simply so that "they could get through, so as to get a tire out." [Tr. pp. 80, 101, 103, 104, 105.]

In addition to this there was an arbitrary number put on with a small stamping machine, on a small card and the word "consigned" stamped on the small card. There was nothing to show any ownership or claim of ownership [Tr. p. 98]; there were no signs in the place to designate ownership [Tr. p. 79], and Mr. Barnes appeared no where as the owner of the tires [Tr. pp. 101-102].

It seems incomprehensible to us with all of these facts considered, that there was any such separation as required by the cases heretofore decided by this Honorable Court upon the subject.

We urge, therefore, that the *legal conclusion* of the referee *upon the facts,* that these tires were kept *separate* from other tires, was clearly erroneous; that his error was an error of law upon the face of the record; and that as against the trustee in bankruptcy it is reversible error.

VIII.

The Said District Court and Said Referee Erred in Finding That the Bankrupt Herein and the Said D. B. Barnes Fixed the Prices at Which the Said Goods Were to Be Sold.

The findings of the referee are that Mr. King was to *pay* to Mr. Barnes "the price at which he was to account to petitioner as fixed in the exhibits and then and there usually gave a check to petitioner (although settlement was sometimes made in cash) for the aggregate amount of such prices for the total number of tires so sold." [Tr. p. 39.]

It cannot successfully be urged that by this finding Mr. Barnes fixed the prices at which Mr. King should sell the tires, for the reason that the only testimony upon the subject was that of Mr. Barnes himself, who testified:

"I did not fix any price for Mr. King to sell the tires, only the price that he was to account to me for the tires" [Tr. p. 78].

This is clearly indicative of a sale, as this Honorable Court held in the case of Miller Rubber Company v. Citizens Trust & Savings Bank, *supra*.

IX.

The Said District Court and Said Referee Erred in Finding That the Bankrupt Was to Account, or in Anywise to Pay Proceeds of Said Sales to Said D. B. Barnes.

We do not find any specific finding or conclusion of the referee [Tr. pp. 33-45] that the bankrupt was to

account to petitioner, Mr. Barnes, for the proceeds of the sales, unless it be found in the transcript, page 39, wherein the referee finds that Mr. King *paid* to Mr. Barnes the prices for the total number of tires so sold.

It seems conclusive from the evidence that the finding *cannot* be construed as a finding to account for the proceeds of sales; but that Mr. King simply *paid* Mr. Barnes for the tires sold. This point, therefore, falls clearly within the decision announced by this court in the Miller Rubber Company case, *supra*.

X.

Said District Court and Said Referee Erred in Each and All of Their Rulings, Decisions, Orders and Judgment and the Conclusions of Law Upon the Facts, Upon the Following Grounds: (a) That the Same Is Contrary to the Undisputed Facts Herein; (b) That the Same Is Inconsistent and Contrary to Law; (c) That the Facts Herein Constituted, in Law, a Legal Fraud Upon and Against the General Creditors Herein.

Under the seperate heads we have discussed the particular questions which are covered in this assignment of error. It seems unnecessary to reiterate any of the facts upon the particular subjects, or to again argue the question

This Honorable Court held, consistent with this assignment of error, in the Miller Rubber Company case, *supra* (there having been no fraud pleaded or

proven), that under all of the facts in the case the contract constituted *a legal fraud upon and against the general creditors of the bankrupt;* and it seems indisputable to us that this case falls clearly within the facts and rulings in that case.

XI.

The Said District Court and Said Referee Erred in Each and All of the Findings of Fact, Rulings, Decision and Orders and Judgment Upon the Ground That Each and All of Said Findings of Fact, Rulings, Decisions, Orders and Judgment, Is Contrary to the Evidence and Contrary and Against the Law.

XII.

The said District Court and said referee erred in sustaining the petition for reclamation herein.

XIII.

The Decision Should Have Been for the Appellant Herein and Against the Respondent.

XIV.

The District Court Erred, Under the Evidence and Law, in Its Finding, Decision, Order and Judgment Sustaining the Petition in Reclamation and in Affirming the Order, Judgment and Decision of the Referee Herein; and That Said Judgment Should Be Reversed.

The last four assignments of error are regroupings of the particular matters complained of in the other

assignments of error. Taking all of the assignments of error (pursuant to the Arabic notations we have made), the case falls clearly within the rule announced by this court in the Miller Rubber Company case, *supra.*

So, too, the facts and the ruling in the Miller Rubber Company case, as held by this Honorable Court, are the opposite of the ruling in the General Electric Company v. Brower, *supra,* for the reason that *all* of the facts in the General Electric Company case, *supra,* were *affirmatively consistent* with the claim of petitioner in that case, while the rule announced by this court in the Miller Rubber Company case indicated that the facts in the latter case were all *against* the petitioner and a fraud upon the general creditors. It appears to us that the Miller Rubber Company case was a much stronger case for petitioner than the case at bar, for the reasons we have set forth,—one of the sanguine grounds being that in the case at bar there was no provision for the *return* of unsold goods.

It *did* require Mr. King to *pay* to Mr. Barnes for the tires sold; that there was *nothing* to show that Mr. King was the *agent* of Mr. Barnes; that Mr. King was *permitted* by Mr. Barnes to *mingle* the goods claimed with his other stock. That there were *no signs up* and no markings on the tires to in any way indicate ownership; that Mr. King *could sell at prices* and upon terms satisfactory to himself only; and *no* provision in the contract for his paying to Mr. Barnes the *proceeds* of the sales. These matters have been carefully covered by us and the references in the transcript where they are found have been pointed out.

The burden of proof was upon the petitioner to establish his right to these tires as against general creditors. It does not seem that petitioner can recover unless the court resolves the *doubts* in *favor* of petitioner. The conclusion of the court in the Miller Rubber Company case was: That the petitioner had failed to satisfy the court of the facts required to establish its rights to specific property as against the claims of general creditors to said property.

Upon the authority of General Electric Company v. Brower, *supra,* upon the one side, and Miller Rubber Company v. Citizens Trust and Savings Bank, *supra,* on the other side, we urge that the judgment herein should be reversed.

Brief of Trustee in Re Empire Tire and Rubber Company.

This was a petition by the Empire Tire & Rubber Company for certain specific property [Tr. pp. 129, 130] arising in the same case, and the two appeals are, by stipulation, prosecuted in the one record [Tr. p. 127]. The answer of the receiver, afterwards trustee, is a specific denial; and in his second defense alleges that said goods were sold to the bankrupt [Tr. pp. 132-135]. The findings of the special master [Tr. pp. 137-148] show the following brief facts:

1. That petitioner supplied the bankrupt with a small stock of goods on "consignment for sale" [Tr. p. 138].

2. That this was wholly by a conversation between Mr. King, the bankrupt, and the secretary of the Empire Tire & Rubber Company [Tr. p. 138]; that the bankrupt was furnished with a price list of petitioner's tires, and the bankrupt was to account to petitioners for the tires sold by *payment* of an amount 20% less than the list price, and a further 5% off of said list price *"for a settlement of accounts within thirty days"* [Tr. p. 139].

3. As to prices the referee found:

"From the evidence it does not definitely appear whether or not King was limited or restricted in any way as to the prices at which he should sell the tires." [Tr. p. 139.]

4. No agreement was made as to the method to be followed by bankrupt in making sales; or collections from sales; *or disposition of money collected;* or the method of display; *or the keeping or not keeping the Empire Tires separate and apart from the rest of the stock.* [Tr. p. 139.]

5. The stock of petitioner carried by the bankrupt was kept together in one part of the shop and occupied a space about four feet square. There was no notice of the ownership of this property, so as to distinguish this particular stock from that of the rest of the stock of the bankrupt. The referee found:

"There was no label or sign on the shelves or over or on the space to distinguish this particular stock from the rest of the tires on sale. The King shop consisted

of a room about twenty feet wide and sixty feet long, in which were displayed and sold tires of many other makes." [Tr. p. 140.]

6. Goods delivered to bankrupt by petitioner were accompanied with a statement marked "Consigned Account," and listing the goods sent. At the end of each month the goods were checked over to ascertain what was sold. Those sold during the month were then billed to the bankrupt on a statement marked *"Regular Account."* For this "Mr. King *made his payment by check* to the Empire Company regularly each month up to the first of September, 1917" [Tr. pp. 140, 141].

7. "No account of sales was made by King, nor sent to the Empire company" [Tr. p. 142].

8. Upon the question of reversion of title, the referee found:

"There is no evidence of any *express* agreement to the effect that the title to the goods delivered by the claimant to King should remain in the claimant; nor is there any evidence of any *express* agreement providing for the *return at any time upon any conditions of goods unsold by King or remaining in his hands."* [Tr. p. 142.]

9. The goods which the receiver, now the trustee, took are described in claimant's petition, and they are still on hand, or the proceeds thereof held by the trustee [Tr. p. 142].

CONCLUSIONS OF LAW.

Upon these facts the referee found as a matter of law that the petitioner was entitled to the goods and an order was entered accordingly [Tr. p. 147].

From this order the referee filed a petition to review [Tr. pp. 151, 153], and the order of the referee was approved [Tr. p. 155].

From these orders and rulings the trustee appealed [Tr. pp. 157-163].

LAW, ASSIGNMENTS OF ERROR, BRIEF OF THE ARGUMENT.

I.

Said District Court and Referee Erred in Their Findings, Ruling, Decision, Orders and Judgment in Finding That the Goods, Wares and Merchandise Placed in the Possession of Said George H. King, Bankrupt, Herein, by Said Empire Tire & Rubber Company, Were Upon Consignment Reserving Title to All or Any of Said Goods, Wares and Merchandise in and to Said Empire Tire & Rubber Company.

II

Said District Court and Said Referee Erred in Not Finding That Each and All of Said Goods, Wares and Merchandise So Placed in the Possession of Said George H. King, Bankrupt, by Said Empire Tire & Rubber Company, a Corporation, Were, and Upon the Facts Are, Upon a Sale of the Same to Said George H. King, Bankrupt.

The foregoing assignments of error may properly be argued together, as they largely constitute the matters and things complained of in the appeal.

Upon the foregoing statement of facts, very clearly appearing in the finding of the referee, it is wholly unexplicable to us how the conclusion of law may be arrived at, that, under those facts, the petitioner was entitled to recover the goods set forth in its petition.

The facts found by the court and stated herein by us, seem to us to make a far weaker case than the Miller Rubber Company case, *supra.*

In the first place it was a *verbal agreement* concerning which no creditor would know or could have known; and there is no evidence that any creditor did know anything concerning it. Further than that, Mr. King made *payment by check* for the goods sold [Tr. p. 141]. The doubt must be resolved against petitioner on the appeal, for these reasons:

1. That there is no evidence and no finding that the bankrupt was restricted in any way as to the *prices* at which he should sell the tires [Tr. p. 139].

2. No agreement as to the *methods* to be followed in making sales or collections from sales [Tr. p. 139].

3. No agreement was made as to the *disposition* of *money* collected [Tr. p. 139].

4. No agreement as to the method of display or keeping Empire tires *separate* and apart from the rest of his stock [Tr. p. 139].

5. The space occupied by these goods was *not* labeled in any way with a *notice* that they were the property of petitioner, nor in any way to distinguish a claim of *ownership* from the rest of the stock [Tr. p. 140].

6. Those sold were billed on *"Regular Account"* at the end of the month and for these Mr. King made payment by check [Tr. p. 141].

7. *"No account of sales was made* by King, nor sent to the Empire Company" [Tr. p. 142]

We urge, therefore, that the case falls clearly within the rule announced by this Honorable Court in Miller Rubber Company v. Citizens Trust & Savings Bank, 233 Fed. 488; and the opposite of the facts, rulings and decisions of General Electric Company v. Brower, 221 Fed. 597. Upon the authority of these cases the judgment herein should be reversed.

III.

Said District Court and Said Referee Erred in Ordering Said Goods, Wares and Merchandise to Be Delivered to Said Empire Tire & Rubber Company.

The rulings, decisions and orders of the referee and the District Court in ordering said goods, wares and merchandise to be delivered to the Empire Tire & Rubber Company was reversible error.

IV.

Said District Court and Said Referee Erred in Not Denying the Petition of the Said Empire Tire & Rubber Company Upon the Following Grounds: (a) Insufficient on its Face; (b) Insufficient in Law; (c) Because the Undisputed Facts and Evidence Showed the Transaction by the Said Empire Tire & Rubber Company and George H. King to Have Been a Sale; (d) That There Is No Evidence to Support the Findings, Ruling, Decision and Orders of Said District Court and Referee Herein.

Upon the authority of Miller Rubber Company v. Citizens Trust and Savings Bank, *supra,* the petition itself is insufficient because it does not show:

1st. That the *prices* at which said goods were to be sold were fixed by petitioner [Tr. pp. 129 *et seq.*].

2nd. That it does *not* allege that the bankrupt was to account to petitioner for the *proceeds* of sales.

3rd. It might be inferred therefrom that the bankrupt could (and in fact he did) *pay* to petitioner for *goods sold.*

4th. It does *not* allege any specific contract.

5th. There is no allegation to the effect that the bankrupt was not permitted to *mingle* these goods with other goods of his own.

6th. There are no facts pleaded showing that the bankrupt was at any time required to *return* any portion of the goods claimed.

For these reasons the petition is insufficient on its face; insufficient in law; and the undisputed facts show the transaction, *in contemplation of law, a sale.*

VI.

The Said District Court and Said Referee Erred in Not Finding and Ruling That the Facts Herein Found, Constituted, in Law, a Legal Fraud Upon and Against the General Creditors Herein.

In accordance with the ruling of Miller Rubber Company v. Citizens Trust & Savings Bank, *supra*, the facts found, the rulings and orders of the referee and District Court are in error upon the ground that the facts found show that the dealings between petitioner and the bankrupt *constituted a legal fraud upon the creditors of the bankrupt.*

Upon the facts found, therefore, the rulings and judgment constitute reversible error.

VII.

The Said District Court and Said Referee Erred in Finding That Each and All of the Goods, Wares and Merchandise Claimed Herein by Said Empire Tire & Rubber Company Were Kept Separate and Apart From the Other Stock of Goods of the Bankrupt.

The referee found that there was no agreement as to keeping or not keeping the Empire tires separate and apart from the rest of the stock [Tr. p. 139], but his *legal conclusions* were necessarily following a rule as

though, among other things, the goods had been kept separate and apart from the other stock of goods of the bankrupt. This was reversible error.

VIII.

Said District Court and Said Referee Erred in Finding That the Empire Tire & Rubber Company Fixed the Prices at Which Said Goods Were to Be Sold.

The referee found that it did not definitely appear whether the bankrupt was limited or restricted in any way as to the price at which it was to sell tires [Tr. p. 139], but his legal conclusions followed a rule as though the findings had been that the petitioner had fixed the prices at which goods were sold. This was reversible error.

IX.

Said District Court and Said Referee Erred in Finding That the Bankrupt Was to Account for the Proceeds of Said Sale.

The referee found that there was no agreement as to the disposition of moneys collected [Tr. p. 139]; and that the bankrupt *paid by check* regularly each month [Tr. p. 141]. However, his legal conclusion was in effect following findings of fact, as though the petitioner had required the bankrupt to account for the proceeds of sales. This was reversible error.

X.

That Said District Court and Said Referee Erred in Sustaining the Petition by Said Empire Tire & Rubber Company, Corporation, for Reclamation of Said Goods, Wares and Merchandise.

XI.

That the Judgment Should Have Been for the Trustee, the Appellant Herein, and That Said Judgment Should Be Reversed.

Consistent with the rulings in General Electric Company v. Brower, and Miller Rubber Company v. Citizens Trust & Savings Bank, *supra,* the conclusion of law arrived at by the referee and the District Court were reversible error. The facts found brought the case clearly within the Miller Rubber Company case, and therefore the petition should have been denied and the judgment should have been for the trustee.

We have argued the questions of law sufficiently in the Barnes appeal herein, that it seems unnecessary to lengthen the argument upon the case in the appeal of the Empire Tire & Rubber Company, especially since counsel for both appellees will have the same brief and since all of the argument is within this one brief and the one record.

Respectfully submitted,

BICKSLER, SMITH & PARKE,

Attorneys for Trustee, Appellant.